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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 476

ROSA GRIFFIN, ADMINISTRATRIX OF THE ESTATE OF GEORGE GRIFFIN, SR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas, consisting of a statement, findings of fact, discussion, and conclusions of law (R. 9-24), is reported at 115 F. Supp. 509. The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 14-23) is reported at 216 F. 2d 217.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1954 (Pet. App. 24). The petition for a writ of certiorari was filed on December 11, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether uncollected service pay earned by a serviceman prior to his absenting himself without leave must be applied to continue his National Service Life Insurance in effect in circumstances where (1) pursuant to the provisions of pertinent Army regulations, his insurance allotment had been terminated by reason of the absence without leave and (2) under pertinent Veterans Administration regulations the insurance lapses at the end of the grace period if a serviceman's allotment is terminated and premiums are not otherwise paid.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Section 602 of the National Service Life Insurance Act of 1940, as amended, 38 U. S. C. 802; of Army Special Regulation 35-1900-5; and of the Regulations of the Veterans Administrator are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

On October 11, 1950, George Griffin, Jr., then a member of the Army Enlisted Reserve Corps, entered upon extended active duty (R. 11). On October 13, 1950, he executed an application for level-premium five year term National Service Life In-

surance, in the amount of $10,000, naming his father, George Griffin, Sr., as principal beneficiary and his mother, petitioner here, as contingent beneficiary (R. 11, 33). Simultaneously therewith, he executed standard Form DD234, authorizing a monthly allotment from his pay, in the amount of $7.20, to pay the premiums on the insurance (R. 51). The application was approved, effective November 1, 1950, and an allotment was made from the insured's service pay to cover the November and December premiums (R. 33).

On November 28, 1950, the insured absented himself without leave from his assigned station, Camp Stoneham, California, and did not return to military duty at any time prior to his death, which occurred on March 24, 1951, at the home of his parents in Clarksville, Arkansas (R.11). At the time he departed from his station, he was placed in a non-pay status but was credited with $64.31 in accrued service pay, covering the period from November 1, 1950, to November 28, 1950 (R. 13. On February 28, 1951, Captain William L. Otis at Camp Stoneham, following the procedure detailed in Army Special Regulation 35-1900-5, 10 October 1950 (*infra,* pp. 18-19), executed another Form DD234 for the purpose of terminating the insured's allotment as of December, 1950 (R. 13, 49, 53). On March 6, 1951, as required by the regulation, the allotment was discontinued effective the end of November, 1950 (R. 13).

On May 2, 1951, George Griffin, Sr. filed a claim with the Veterans Administration, for the pro-

ceeds of the serviceman's insurance (R. 12). On January 23, 1952, he was advised that the claim was disallowed on the ground that the insurance had been cancelled, effective November 28, 1950, on the determination by the Veterans Administration on October 11, 1951, that the insured had deserted from the armed forces (R. 12, 57). On March 28, 1952, this suit was instituted to recover the proceeds of the policy (R. 1-5).[1]

In its answer to the complaint, the Government alleged that the insurance was not in force at the time of the serviceman's death for two wholly independent reasons (R. 5-7). In addition to the matter of the forfeiture of the policy on the administrative determination of desertion, it was asserted that, under the applicable regulations of the Veterans Administration, the insurance had lapsed at the end of December, 1950 by reason of the failure of premium payments subsequent to November, 1950 (R. 6).

On October 15, 1953, the District Court entered judgment against the United States (R. 24-25). As to the question of lapse for non-payment of premiums,[2] it ruled that the Army, having in its possession accrued service pay owing the insured, was

---

[1] During the pendency of the suit, Griffin, Sr. died and petitioner, as administratrix of his estate, was substituted as party plaintiff (R. 9).

[2] Regarding the question as to forfeiture, which was not raised by the Government in the Court of Appeals, the District Court found on the evidence that the insured had not deserted from the Army (R. 15-20).

not empowered to discontinue the insurance allotment (R. 20-23). Recognizing that Special Regulation 35-1900-5 provides that such allotments "will be discontinued as of the last day of the most recent month during which sufficient pay accrues to the allotter from which the deduction may be made" (see p. 19, *infra*), the court held that "a proper construction of this regulation is that such allotments are to be discontinued only when there is no accrued active service pay from which to deduct the amount of said allotment", adding that any other construction would render the regulation invalid (R. 20-21). In so holding, the court read Section 602(m)(1) of the National Service Life Insurance Act, *infra*, p. 17, as imposing upon the service branches, in cases where the insured elects to have premiums paid by allotment, an obligation to deduct premiums out of any accrued active service pay owing to the serviceman (R. 20-21).

On October 29, 1954, the Court of Appeals reversed (Pet. App. 14-24). It held that Special Regulation 35-1900-5 required the discontinuance of the insured's allotment and that the regulation was valid (Pet. App. 17, 22). The court further held that, the allotment having been discontinued, the Government was under no duty to apply the accrued service pay to prevent a lapse of the insured's policy for non-payment of premiums (Pet. App. 22-23).

ARGUMENT

Under the plain terms of applicable administrative regulations, the Army was under a duty to ter-

minate the serviceman's National Service Life Insurance allotment as of November 28, 1950, the date on which the insured absented himself without leave, and, premiums not being otherwise paid, the policy lapsed at the expiration of the grace period, some three months prior to the insured's death. The court below was clearly correct in holding that these regulations are valid and further review by this Court is not warranted.

1. It is undisputed that when the insured absented himself without leave on November 28, 1950 he was in a non-pay status continuously from that day until his death on March 24, 1951.[3] Accordingly, in subsequently terminating the serviceman's insurance allotment, as of November 30, 1950, the Army finance officers simply were complying with the provisions of paragraphs 1a(6) and 3b(1)(b) of Special Regulation 35-1900-5 (*infra*, pp. 18-19), which call for the automatic discontinuance of, *inter alia*, the Class N (N. S. L. I. premium) allotment of a serviceman in a non-pay status for ten days or more; such discontinuance to take effect "as of the last day of the most recent month *during which sufficient pay accrues* to the

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[3] By statute and Army regulation, neither pay nor allowances will accrue to any person in the military service during unauthorized absences in excess of 24 hours, unless excused as unavoidable. See Section 4 of the Act of August 9, 1946 (60 Stat. 963, 964), as amended by Section 1 of the Act of August 4, 1947, 61 Stat. 748, 37 U.S.C. 33(b); AR 35-1030, 10 January 1950, para. 3a.

allotter from which the deduction may be made," [Emphasis added.] [4]

Contrary to petitioner's belief (Pet. p. 11), the termination of an insurance allotment pursuant to the authority of SR 35-1900-5 does not work a forfeiture of the serviceman's policy. Rather, it has the sole effect of transferring to him the responsibility for the payment of the premiums necessary to keep the policy in effect. Subject to certain exceptions which do not apply in the circumstances of this case (see pp. 8-10, *infra*), the applicable regulations of the Veterans Administrator provide that National Service Life Insurance will lapse if the service department discontinues the serviceman's allotment and *the premium is not otherwise paid* prior to the expiration of the 31 day grace period. 38 C. F. R. (1949 ed.) § 8.18 (*infra,* pp. 19-20). Cf. 38 C. F. R. (1949 ed.) §§ 8.14, 8.16, 8.20. Here, no premium payments were made by the serviceman himself, or by anyone on his behalf subsequent to November 30, 1950.[5] Therefore, the

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[4] While Special Regulation 35-1900-5 was promulgated on October 10, 1950, prior Army regulations dictated the same procedure. Cf. n. 7, *infra*, p. 10.

[5] Petitioner's assertion (Pet. p. 10) that the Court of Appeals unjustifiably assumed that the premiums were not paid from another source after the insured absented himself without leave has no merit. In its answer to the complaint, the Government specifically denied that the premium due January 1, 1951, had been paid (R. 6). At all times during the trial, as well as in her brief on appeal, petitioner accepted the theory that the single inquiry on the question of lapse was whether the insured's accrued service pay should have been applied to keep the policy in force.

policy was not forfeited as petitioner contends, but rather, like any other insurance policy where the required premiums are not paid, lapsed, here on January 1, 1951, for non-payment of premiums.[6]

2. Seeking to avoid these regulations, petitioner argues that SR 35-1900-5, as here applied, is invalid because contrary to the National Service Life Insurance Act (Pet. p. 10). As the court below recognized, however, the established practice of automatically discontinuing the insurance allotment of a serviceman in an absent-without-leave status has received Congressional recognition (Pet. App. 22). Furthermore, the practice is authorized as a necessary adjunct of the allotment system.

(a) As initially enacted in 1940, the National Service Life Insurance Act provided in Section 602(m) simply that premiums could at the election of the insured be deducted from his service pay (54 Stat. 1011). By Section 6 of the Act of August 1, 1946, 60 Stat. 781, 784, Section 602(m) was amended by the addition of the following as subsection (2):

> In any case in which the insured provided for the payment of premiums on his insurance by

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[6] The serviceman expressly authorized the deduction of two months premiums from his November, 1950, pay (R. 51). Accordingly, on November 30, 1950, the premiums due on November 1, 1950, and December 1, 1950, had been allotted. While the serviceman had a thirty-one day grace period in which to pay the premium due on January 1, 1951, the Veterans Administration Regulations provide that "[i]f a premium is not paid prior to the expiration of the grace period, the effective date of the lapse shall be the due date of the premium in default". 38 C.F.R. (1949 ed.) §8.15.

authorizing in writing the deduction of premiums from his service pay, such insurance shall be deemed not to have lapsed so long as he remained in active service prior to [August 1, 1946,] *notwithstanding the fact that deduction of premiums was discontinued because—*

* * * * *

(B) *the insured was absent without leave,* if restored to active duty; [Emphasis added]

The reason for this addition was set forth in the Senate and House Committee Reports in these terms:

Under regulations issued by the War Department, an allotment for deduction of premiums was *automatically* discontinued if the insured was absent without leave 15 days or more. Upon restoration to active duty, the individual was not advised that his allotment had been terminated, nor was he ever offered an opportunity to make a new allotment. Some such individuals also died believing their insurance was in force. In still other cases, a veteran sentenced by court martial was restored to active duty and required to engage in combat, or was killed in combat while confined in a combat area or on a ship engaged in combat. In some instances, insurance had lapsed because the veteran was on a nonpay status. Your committee is of the opinion that payment of insurance [benefits] should not be de-

nied under the circumstances stated. [Emphasis added.] [7]

Thus, Congress was aware that Army regulations require the *automatic* termination of allotments when a serviceman is absent without leave for a stipulated period. And, rather than invalidating these regulations, or prohibiting the Army from discontinuing allotments in particular circumstances, Congress chose instead to permit the Army to discontinue allotments but to relieve the serviceman of the consequences in certain specified situations. These relief provisions, of course, afford no comfort to petitioner; they do not apply here, both because the insured's absence took place in 1950 (i.e., subsequent to August 1, 1946), and because there was no restoration to active duty.[8]

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[7] S. Rept. 1705, 79th Cong. 2nd Sess. p. 5; H. Rept. 2002, 79th Cong. 2nd Sess. p. 6. The committee reports had reference to AR 615-300, 25 March 1944, para. 11b (1) which provided for the automatic termination of allotments when the serviceman was in a non-pay status for 15 days. This regulation was superseded by AR 615-300, 17 March 1947, which in paragraph 9b reduced the period to 10 days. The provisions of this regulation were carried over into SR 35-1900-5, the regulation under which the insurance allotment was terminated.

[8] Even if the posthumously awarded certificate of honorable service (R. 12) were to be considered the equivalent of an honorable discharge (Pet. p. 11), it was hardly the equivalent of a restoration to active duty. Nor, as both courts below recognized, did it alter the fact that at the time the allotment was terminated the serviceman was absent without leave. Further, while it would not assist petitioner even if the unauthorized absence subsequently had been excused, the record does not show that this took place.

(b) Quite apart from the 1946 amendment to Section 602(m), there is no basis for petitioner's assertion that SR 35-1900-5 conflicts with the Act. The regulation is a reasonable exercise of the discretion conferred upon the Secretary of the Army to permit military personnel to make allotments from their service pay "under such regulations as he may prescribe". Section 16 of the Act of March 2, 1899, c. 352, 30 Stat. 981, as amended, 10 U. S. C. 894.

Indeed, it is apparent upon analysis that the regulation does no more than to give content to the commonly understood fiscal meaning of the term "allotment"—namely, that *portion* of the individual's salary, wages, or other compensation which is *specifically allocated* for one or more particular purposes. See Webster's New International Dictionary (2nd ed. 1949) p. 70; *United States* v. *Jones*, 101 F. Supp. 128, 131 (S. D. W. Va.). And the adoption of an allotment system, permitting deductions at the serviceman's request only from currently accruing pay, is dictated by several important administrative considerations.

One such consideration is that, even where the absentee serviceman has authorized solely an insurance allotment, there may be other charges against his accrued pay. For example, the expenses incurred by the Government in connection with the apprehension of a serviceman who is absent without leave are chargeable against him. AR 35-1570, 14 May 1953, paras. 2b, 6. See also AR 35-2620, 30 June 1943, para. 3. Thus, when a serv-

iceman departs from his assigned station without leave, a potential indebtedness to the Government immediately arises. Whatever credit the serviceman has at the time, after the authorized deductions are made for the period during which the credit accrued, appropriately serves as security not only for the satisfaction of this indebtedness, should it materialize, but also for the satisfaction of other obligations running to the Government which the passage of time may bring to light. Cf. 10 U. S. C. 871-875.

Additional considerations come into play when the serviceman has authorized more than one allotment from his pay, *e. g.* one for insurance and another for the support of his dependents.[9] As long as he remains on pay status, there will be sufficient funds to keep both allotments in force.[10] But once the serviceman's pay has been terminated, the finance officer of his organization, if required to continue deductions out of accrued pay, might

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[9] Army personnel are authorized to make allotments for the following purposes, among others: purchase of war (defense) bonds; additions to savings accounts in banks or in the postal savings system; payment of premiums on United States Government Insurance, National Service Life Insurance or commercial insurance; support of dependents; repayment of certain types of loans. See AR 35-1900, 16 August 1949, paras. 2, 5a.

[10] An enlisted man may only allot that portion of his pay, base and otherwise, which will leave, after required reductions, including federal withholding income tax, have been made, "a monthly balance of $10., or such other amount as may be determined by his commanding officer to be necessary to meet his essential personal needs." AR 35-1900, 16 August 1949, para. 7(2).

have to choose from among numerous alternative courses of action. The insurance deduction might be continued for as long as the credit would allow, the dependency deduction being forthwith terminated; the converse arrangement might be adopted; or both deductions might be continued until the credit becomes exhausted.

At most, only one of these alternatives could possibly accord with the desires of the particular serviceman. And, since an absentee without leave does not customarily leave instructions as to the disposition of his accrued pay, the responsible officers would be placed in the impossible position of either speculating as to his preference or making an independent judgment as to the procedure that would best serve his interests. The path always would be open for the absentee, his dependents and/or the beneficiaries of his National Service Life Insurance later to claim, aided by hindsight, that the selection made by the Army was improper.

3. Petitioner's assertion (Pet. p. 12) that the decision below conflicts with *United States* v. *Morrell*, 204 F. 2d 490 (C.A. 4), certiorari denied, 346 U.S. 875, is without substance. There, the Government was indebted to the insured by reason of the latter's *overpayment of premiums* and the Fourth Circuit held, after determining that to do so would not conflict with the governing statute and applicable administrative regulations, that the resultant credit in the insured's favor should have been used by the Veterans Administration to pre-

vent a lapse of his National Service Life Insurance for non-payment of premiums. At the same time, however, the court expressly distinguished and approved [204 F. 2d at 493] its earlier decision in *Mikell* v. *United States,* 64 F. 2d 301. In *Mikell,* the beneficiary had claimed, as does petitioner here, that the Government should have applied accrued service pay owing the insured towards the payment of premiums. In rejecting this contention, Judge Parker had noted that [64 F. 2d at 302]:

> * * * When the government goes into the business of insurance, it is permissible to apply to it the rules applicable to insurance companies so far as transactions relating to insurance are concerned, but no farther; and an insured who defaults in the payment of premiums on a government policy is not entitled to have his insurance continued in force merely because in some of its various activities, not connected with insurance, the government is indebted to him. * * *.

We submit that the instant case falls squarely within this principle, which, it should be noted, is followed with respect to commercial insurance as well. See *e.g. Leffingwell* v. *Grand Lodge A.O. U.W.,* 86 Iowa 279, 53 N.W. 243; *Pister* v. *Keystone M. Ben. Asso.,* 3 Pa. Super. Ct. 50; *Caywood* v. *Supreme Lodge K.L.H.,* 171 Ind. 410, 86 N.E. 482.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
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JANUARY, 1955.

APPENDIX

1. Section 602(m) of the National Service Life Insurance Act of 1940 c. 757, 54 Stat. 1008, as amended, 38 U.S.C. 802(m) provides as follows:

> (1) The Administrator shall, by regulations, prescribe the time and method of payment of the premiums on such insurance, but payments of premiums in advance shall not be required for periods of more than one month each, and may at the election of the insured be deducted from his active-service pay or be otherwise made: *Provided,* That an amount equal to the first premium due under a national service life-insurance policy may be advanced from current appropriations for active service pay to any person in the active service in the Army, Navy, Marine Corps, or Coast Guard, which amount shall constitute a lien upon any service or other pay accruing to the person for whom such advance was made and shall be collected therefrom if not otherwise paid: *Provided further,* That no disbursing or certifying officer shall be responsible for any loss incurred by reason of the advance herein authorized: *And provided further,* That any amount so advanced in excess of available service or other pay shall constitute a lien on the policy within the provisions of section 454a of this title.
>
> (2) In any case in which the insured provided for the payment of premiums on his insurance by authorizing in writing the deduc-

tion of premiums from his service pay, such insurance shall be deemed not to have lapsed or not to have been forfeited because of desertion under section 812 of this title, so long as he remained in active service prior to August 1, 1946, notwithstanding the fact that deduction of premiums was discontinued because—

(A) the insured was discharged to accept a commission; or

(B) the insured was absent without leave, if restored to active duty; or

(C) the insured was sentenced by court martial, if he was restored to active duty, required to engage in combat, or killed in combat.

In any case in which the insured under any insurance continued in force by the provisions of this paragraph died while such insurance was so continued in force, any premiums due on such insurance shall be deducted from the proceeds of the insurance. Any premiums deducted or collected on any such insurance shall be credited to the national service life insurance appropriation and any payments of benefits on any such insurance shall be made directly from such appropriation.

2. The pertinent provisions of Army Special Regulation 35-1900-5, 10 October 1950, are as follows:

Paragraph 1a(6) When a person is in a continuous nonpay status for 10 days or more, e.g., AWOL, the personnel officer will prepare

separate Forms 234 for each class of allotments (E, D and N) and forward such forms promptly to the disbursing officer having custody of the person's military pay record * * *. Upon receipt of Forms 234, the disbursing officer will discontinue deductions of such allotments by closing out the entry on the Military Pay Record (NME Form 113) of the individual concerned. * * *.

* * * * *

Paragraph 3b (1)(b) Class D and N allotments will be discontinued as of the last day of the most recent month during which sufficient pay accrues to the allotter from which the deduction may be made.

3. The pertinent provisions of the Regulations of the Veterans Administrator are as follows:

(a) 38 C.F.R. (1949 ed.) Section 8.18

National Service life insurance will lapse and terminate while the insured is in the active military or naval service of the United States:

(a) If the insured fails to designate a method of payment of premiums at the time of applying or at any time elects to pay premiums on said insurance otherwise than by allotment of pay and such premiums are not paid prior to expiration of the grace period.

(b) Except as provided in § 8.20 if the service department shall discontinue the allotment

and premium is not otherwise paid prior to expiration of the grace period.

(b) 38 C.F.R. (1949 ed.) Section 8.20

(a) Where the insured provided for payment of the premiums by authorizing in writing the deduction of premiums from his service pay, insurance shall be deemed not to have lapsed while he remained in active service, prior to the date of enactment of Public Law 589, 79th Congress, approved August 1, 1946, provided the deduction of premiums was discontinued because * * * (2) the insured was absent without leave, if restored to active duty; * * * If the insured died while the insurance was continued in force as provided above, payment of the benefits shall be made directly from the National Service life insurance appropriation, and any premiums due on such insurance shall be deducted from the proceeds of the insurance.

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IN THE

Supreme Court of the United States

(OCTOBER TERM 1954)

ROSA GRIFFIN, Administratrix of the Estate of GEORGE GRIFFIN, SR., Deceased ..... Petitioner

vs. No. 476

UNITED STATES OF AMERICA ..... Respondent

PETITIONER'S REPLY TO BRIEF OF RESPONDENT

The respondent in this case has not questioned the basic grounds for granting certiorari set out in the petition, but has argued the merits of the respondent's case.

It is not denied that the Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court. It is not denied that the Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court. In fact, the brief of the respondent wholly ignores these two questions and touches only the basic ground that the decision is in conflict with the decision in the case of U. S. vs. Morrell, 204 F. 2d 490, asserting that it is distinguishable on fact, but the respondent does not assert that it is distinguishable on principle.

In arguing the merits of the case, the respondents make the bald assertion on Page 7 "Here no premium payments were made by the serviceman himself, or by anyone on his behalf subsequent to November 30, 1950." Then in the footnote justifies this assertion by saying, "In its answer to the complaint, the Government specifically denied

that the premium due January 1, 1951, had been paid"; but the respondent does not contend that any evidence whatever was offered to support this defense alleged in the complaint. The record shows that no evidence was offered. While the rules for the admissibility of evidence have been greatly liberalized, we have never yet understood that allegation supplies the absence of proof.

The respondent argues that by reason of an amendment passed by Congress in 1946, continuing National Service Life Insurance in force under certain conditions, that Congress thereby intended to increase the power of the Army to destroy insurance in other respects.

The 1946 Act as quoted by the respondent was amended by the Service Men's Indemnity Act of 1951, which act is retroactive by its terms and would entitle the family of this type service man to the indemnity since he was not a deserter. The government by failing to appeal from this decision of the trial court has admitted that he is not a deserter, but the indemnity has not been offered and the position has been taken by the counsel for respondent that suit cannot be brought under the Indemnity Act. In the amendment to the 1946 Act cited by respondent an additional clause was added to provide, "such insurance shall be deemed not to have lapsed or **not to have been forfeited under Section 812** of this title so long as he remained in active service prior to August, 1946 ***."

In the House Mangers report on the conference on this bill it is reported that the black face clause was inserted in accordance with an amendment by Senator Aiken of Vermont and is in line with section 8 of the Indemnity Act of 1951 providing for the indemnity in the event of restoration to active service and then the report states that restoration to active duty should include restoration of insurance benefits.

It is clear that Congress was approving the holding of this Court in U.S. v. Kelly, 82 U.S. 36 which holds that an honorable discharge is a formal final judgment on the entire military career and removes any charge or impediment in the way of receiving bounty.

A clear intention to extend the benevolent purposes of the act cannot be distorted into a grant of power to destroy those same benevolent purposes.

The petitioner submits that limitation upon the Army's power to, in effect, forfeit insurance by regulation, is not a justification for an extension of that power. The respondent then, in the footnote, suggests that the honorable service certificate is not the equivalent of the restoration to active duty, even though it is the equivalent of an honorable discharge. This certificate of honorable service can be issued only to those who die in line of duty while in the active military service. (Army Regulation 600-45-3, Petitioner's Appendix 3-32).

The respondent's whole case is based upon Army Regulations.

It cannot be contended on the one hand that Army Regulation 600-45-3 is meaningless and can be ignored at will or that it is a regulation merely for the purpose of salving the feelings of the next of kin of those who die in the military service of our country, but when a dollar is involved, it may be disregarded and on the other hand, that Regulation SR 36-1900-5 shall be invoked at the will of a commanding officer for the purpose of destroying the insurance benefits of that same soldier.

The Secretary of the Army, under the Army's own regulation could not have issued the certificate of honorable service, unless the soldier died "in line of duty while in the active military service of his country." It, therefore, follows that at some point the Secretary of the Army, in making a final formal judgment found that the deceased serviceman, if ever AWOL, had been restored to active service.

The respondent tacitly admits that the certificate is the equivalent of an honorable discharge, which under the decisions of this Court, is a formal final judgment on the entire military career of the service man. It is tacitly admitted by the fact that the finding of the trial court was not challenged on appeal.

It is also clearly the intent and purpose of Congress to extend even the benefits of the free indemnity to all who died in active service and who were not guilty of treason, spying or desertion. Any regulation promulgated by the Army for the purpose of destroying this intent is wholly void as it was held by the Trial Court in this case.

Petitioner could, and perhaps should, argue this case on the merits as extensively as done by the respondent, but the limited knowledge of counsel for petitioner indicates argument on the merits should be made after the petition for certiorari is granted. As stated before, the basic grounds for granting certiorari have not been really challenged by respondents brief.

Petitioner respectfully prays that this Court grant Certiorari herein and that upon final hearing and consideration reverse the Court of Appeals and restore the judgment of the Trial Court.

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